89-649

No:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

FRANKLYN ARANGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Certiorari to the United States Court of Appeals, Seventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the Appellate Court erred in applying the search-incident-to-arrest exception to validate the search of a vehicle where the arrestee is brought back to the location of the vehicle by the arresting officers;

Whether the Appellate court erred in affirming the District Court's dismissal without prejudice for a three-month violation of the Speedy Trial Act, where the delay was due to the District Court's misunderstanding of fundamental Speedy Trial law;

Whether the Appellate Court erred in affirming the District Judge's use of defendant's self-incriminating testimony at his suppression hearing to make his decision to dimiss without prejudice.

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TABLE OF AUTHORITIES

OPINION BELOW

The opinion of the Court of Appeals below (Appendix, infra, p.A-1) is reported in 879 F 2d 1501. The opinion of the District Court below was not reported.

JURISDICTION

The judgment of the Court below (Appendix, infra, p. A-1) was entered on July 17, 1989. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution, which provides;

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment, United States Constitution, which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

3. 18 U.S.C. § 3161 (c)(1), which provides:

"In any case in which a plea of not guilty is entered, the trial of a defendant

is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent."

4. 18 U.S.C. §3161 (h)

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * *

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * *

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

6. 18 U.S.C. § 3162, Sanctions:

* * *

(2) If a defendant is not brought to trial within the time limit required by section 3161 (c) as extended by section 3161 (h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161 (h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors; the seriousness of the offense; the facts and and circumstances of the case which led to the dismissal;
and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

7. The statutes under which petitioner was prosecuted, although nothing turns on their terms, were:

a. Title 21 U.S.C. § 846:

b. Title 21 U.S.C. § 841 (a)(1):

c. Title 18 U.S.C. § 111:

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of Proceedings

On October 29, 1987, petitioner Franklyn Arango was arrested and charged on October 30 in a criminal complaint with conspiracy and possession of cocaine with intent to distribute.

On December 28, 1987, petitioner filed his motion to suppress any item seized from his person or items seized as a result of searches of the Jeep which he had occupied just prior to his arrest. On March 8,9, and 17, 1988 a hearing was held on the motion to suppress. The court denied the motion on July 15, 1988.

On August 9, 1988, the petitioner filed a motion to dismiss the indictment on the ground that the Speedy Trial Act had been violated. On August 26, 1988, the petitioner's motion to dismiss was granted, without prejudice. On that same date, a criminal information was filed which was identical to the dismissed indictment. On August 30, 1988, a jury convicted the petitioner on all three counts of the information. The defendant filed a timely notice of appeal on October 31, 1988. Petitioner appealed his conviction to the United States court of Appeals for the Seventh Circuit, entitled United States of America v. Franklyn Arango, Case No: 88-315. Petitioner's judgment and sentence were affirmed on appeal, in an opinion decided July 17, 1989.

B. The relevant facts surrounding the

searches of petitioner prior to and after his arrest are set forth in the opinion of the Appellate Court.(Appendix infra p.A-2).

C. Relevant Facts Concerning the Suppression Hearing and the Hearing on the Motion to Dismiss Under the Speedy Trial Act.

At the hearing on petitioner's Motion to Suppress, petitioner admitted to his possession of the cocaine, in order to establish his standing to challenge the search that led to the discovery of the cocaine.The district court denied petitioner's motion on the grounds that:

1. the search uncovering the one kilo of cocaine in the back of the vehicle was a valid search incident to defendant's arrest;

2. The subsequent search of the vehicle, revealing more cocaine in a secret

compartment below the rear seat of the vehicle was a valid inventory search.

Throughout the proceedings, District Court Judge Moran believed that all the time, up until he decided the motion to suppress, was excludable under the Speedy Trial Act.

When petitioner filed his motion to dismiss, with supporting memorandum of law, the judge realized his error. He dismissed without prejudice for the following reasons:

1. the delay was due to the court's misunderstanding of the law, and not to the fault of the government;and

2. he was aware of the petitioner's incriminating testimony at the Suppression hearing.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court for the Northern District of Illinois, Eastern Division, of conspiring to possess and possession with intent to distribute cocaine, in Violation of Title 21, United States Code Sections 846 and 841(a)(1) and assault on a federal officer, in violation of Title 18 United States Code Section 111.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Court of Appeals has decided three federal questions in a way which conflicts with the applicable decisions of this court.

A. The Automobile Search

The first issue in this case involves the warrantless search of an automobile. This court has held that the passenger area of an automobile can be legally searched where the search is incident to the arrest of an occupant of the vehicle. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The underpinning of that case was this Court's decision in Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034 (1969).The Chimel court held that when an individual is arrested, he may become desperate, and attempt to grab a weapon or conceal evidence, and there is no time to get a search warrant in such a situation. The Belton decision went further, and established a "bright line" rule, whereby a search of an autombile

is valid when an occupant of the vehicle is arrested,no matter whether or not the arrestee could possibly reach anything in the car. 453 U.S. 2864. This rule was intended to eliminate the burden on a police officer to try to guess whether an arrestee could or could not reach a weapon or other container. However, the Belton opinion did not overrule the long-standing principle that once a person is arrested and in custody, a search conducted at another place and time cannot be upheld as incident to the arrest. See: Chambers v. Maroney, 399 U.S. 42, 47, 90 S. Ct. 1975, 1979 (1970).

The Appellate Court's decision, in applying the "bright line" rule in this case, has ignored the facts and holding of the Belton case, where the defendant was an occupant of the vehicle

and the arrest took place near the vehicle. The Appellate Court has impermissably extended the Belton "bright line" rule, to allow the search of a vehicle where the arrestee is brought to the location of the vehicle by the arresting officer, after the arrest has taken place.

This holding injects a dangerously subjective element into the objective test of Belton , granting to law enforcement officers virtually unlimited discretion to search a vehicle when they arrest an individual, no matter what the crime is alleged to be.

We believe that both the District Court and the Appellate Court were highly sensitive to the fact the petitioner was dealing in illegal drugs, and that this knowledge clouded their reasoning in this case. However, the case law

applies to everyone, and not only those who deal in illegal drugs; the Appellate Court's decision will be applied to all citizens, innocent or guilty, no matter what they are accused of doing.

From the officers' testimony at trial, as well as the facts as stated by the Appellate Court, it is clear that the officers in this case intended to search the vehicle as soon as they spotted it. The area was a known drug-trafficking area, and the officers received a call over their radio, to the effect that petitioner's vehicle was "seen." In addition, the behavior of the officers prior to the time petitioner ran, indicates that neither officer was following any of the major rules of the law of search and seizure that have been enunciated by this court. The officers admittedly approached petitioner

and his companion, reached into their pockets, went into the locked van, and searched through petitioner's wallet. This behavior illustrates the fact that the officers acted randomly, and seek to justify the search at issue after the fact. In addition, it also illustrates the pressing need to adopt at least minimum standards, to deter such conduct against private citizens.

The suppression of illegally obtained evidence is necessary in order to deter unlawful police conduct, which in turn protects the highly valued privacy rights of individuals.Terry v.Ohio, 392 U.S. 1,12, 88 S.Ct. 1868, 1875 (1968).In enacting the Fourth Amendment, the drafters refused to assume the good faith of law enforcement officials, and knew that an officer investigating crime must have legal restraints on his power;

without such restraints, the government becomes oppressive, and the rights of the individuals are lost. Id.

The Belton rule effectively abolished the requirement that an arrestee be physically able to reach anything in the vehicle, since an auto search is now valid even if the arrestee is handcuffed, and sitting in the police vehicle. The Appellate Court has now extended this holding too far; the arrest need not even take place near the vehicle, as long as the arrestee is brought back to the area of the vehicle, even though he is handcuffed and detained in the back of a squad car.This decision carves out a completely new exception to the requirement of a search warrant, and permits the automatic search of any vehicle the arrestee has ever occupied. There is no rationale in any of this

Court's decisions that would support such an exception to the warrant requirement of the Fourth Amendment. The officers in this case were in no position to have to judge distances or petitioner's ability to grab anything in the vehicle, when the arrest was made petitioner and all of the officers were over a block away. There were at least three officers in this case, and they would have had time to get a search warrant, help the fallen officer, and transport defendant to a place of confinement, all safely and without any need to search the vehicle immediately.

The officers in this case did not bother to try to get a warrant; they would have been unsuccessful if they had tried at the time of arrest, since they had no probable cause to believe there was anything in the jeep. They

had not followed petitioner long enough to even have an "articulable' suspicion of criminal activity when they stopped petitioner on foot, as the district judge so found.

If this case is allowed to stand, the result will be an eroding of the fundamental rights of U.S. citizens everywhere, and will abolish the protections of the Fourth Amendment, as it applies to citizens and their automobiles.

B. Use of petitioner's self-incriminating testimony from his Suppression hearing as a reason to allow reprosecution.

The Appellate Court never reached the issues raised by petitioner, that the use of his incrimiating testimony at his Suppression hearing, to deny him dismissal with prejudice, violated his

Fifth Amendment right to due process, and his right not to be forced to incriminate himself. The Court merely stated that the judge considered the petitioner's testimony as it related to seriousness of the offense, but a reading of the entire transcript clearly shows that the judge was disturbed by the fact that petitioner openly admitted that he was a drug dealer, in order to establish his standing to challenge the search of the vehicle he was riding in.

The Appellate court affirmed the District Court's use of petitioner's incriminating testimony at his suppression hearing, in order to allow the reprosecution of petitioner after dismissal. We could find no case law that would support this proposition. This holding now requires a criminal defendant charged with a possessory crime

to make a "Hobson's choice"; he can choose to assert his Fourth Amendment rights, but must forego his statutory right to a speedy trial. See: Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1968).

In addition to the rights of this defendant, this holding further undermines the deterrent purposes of the exclusionary rule. By putting too high a price on defendant's challenge of the searches, the court discourages such challenges, thereby opening the door to increasing lawless conduct on the part of police officers.

C. Reasons for allowing reprosecution.

And finally, the Appellate Court found that the three month delay in this case, beyond the permissable time allowed by the Speedy Trial Statute, resulted from the District's Court's

misapprehension of the "status" of various motions before the Court. (Appendix infra p.A-13). This finding is clearly inaccurate; the District Court judge admitted that he was wrong about the law of the Speedy Trial Statute, and thought that all the time was excludable, from the time defendant filed his motion, until the court rendered its decision.

The reasons for the delay in this case are exactly what the legislature was trying to prevent by enacting the Speedy Trial Statute, that is, studied incompetence within the system of criminal justice. This is not a case of excusable neglect, where the government misses a deadline by a few days or weeks due to inadvertence. Instead, this case involves lack of knowledge on the part of the court and the government, of basic law surrounding the speedy trial act;

such lack of knowledge should not be rewarded by allowing reprosecution of this petitioner, especially in light of the three month delay and the fact that petitioner was incarcerated the entire time.

CONCLUSION

The facts of this case, from the illegal, investigatory searches conducted by the officers, right through the dismissal and reprosecution of petitioner by the District Court, exhibit a disturbing picture of the crimial justice system. Should this opinion be allowed to stand, the Fourth Amendment as it applies to automobiles will exist only as an abstract idea. This outcome would serve to encourage lawless police conduct, by granting officals discretion to search at random, and by discouraging defendants

from challenging the search. And a District Court will be held to a much lower standard than the average American, who has long been presumed to know the law.

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APPENDIX TO PETITION FOR CERTIORARI

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-3135

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANKLYN ARANGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 CR 715-1—**James B. Moran**, *Judge.*

ARGUED MARCH 27, 1989—DECIDED JULY 17, 1989

Before BAUER, *Chief Judge*, and KANNE and HENLEY, *Circuit Judges.**

KANNE, *Circuit Judge.* Franklyn Arango appeals the district court's refusal to suppress evidence discovered during two warrantless automobile searches conducted after he was arrested for assaulting a police officer. He also appeals the court's decision to grant his motion to dismiss pursuant to the Speedy Trial Act without prejudice, rather than with prejudice as he had requested. We affirm.

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* The Honorable J. Smith Henley, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

I. BACKGROUND

On October 29, 1987, two DEA Task Force members, Detective Clifford Berti and Sergeant Thomas Martin of the Chicago Police Department, were participating in an on-going narcotics investigation on the north side of Chicago. While patrolling a neighborhood where active drug trafficking was suspected, the officers received a radio message that a white Cherokee jeep, with no license plates, had been observed in the area. The message did not link the vehicle or its occupants to any known illegal activity, but the situation was considered suspicious. The officers later saw the jeep and followed it for about nine blocks until it pulled over and parked. The officers parked their unmarked police car nearby as the jeep's driver, Tony Maldonado, and its passenger, the appellant Franklyn Arango, left the jeep and began to walk in the officers' direction.

Officers Berti and Martin, experienced narcotics investigators, immediately noticed that Maldonado and Arango each were wearing digital beepers which were activated, indicating incoming calls. They then initiated contact with Maldonado and Arango near the jeep, identifying themselves as police officers and asking the suspects for identification.

Maldonado produced a wallet, containing an Illinois driver's license, and handed the wallet and his car keys to Officer Berti. However, Arango replied that he did not have any identification with him. The two officers openly discussed that they both had seen Arango before, but were not sure under what circumstances. Officer Berti asked Maldonado if he was the owner of the jeep and received a negative response. When asked who the owner was, Maldonado hesitated, glanced at Arango, and stated that he did not know.

Throughout this exchange, Maldonado repeatedly placed his hands in his pockets and then removed them. Officer Berti instructed Maldonado to keep his hands out of his

pockets, apparently fearing that Maldonado might be carrying a weapon. When Maldonado again placed his hands in his pockets, Officer Berti immediately instructed Maldonado to remove his hands and reached into Maldonado's jacket pocket, pulling out cash totalling over $2,200.00.

Thereafter, Officer Berti walked to the jeep and looked inside the window in an attempt to establish the vehicle's owner and Arango's identity. When he looked through the window, Officer Berti observed a portable telephone between the seats and a man's wallet on the passenger seat where Arango had been sitting prior to leaving the vehicle. Officer Berti opened the locked door, using the keys which Maldonado had given him earlier, picked up the wallet, and looked inside. Upon seeing Arango's photo identification, he remembered that a fellow DEA agent had told him that Arango was wanted in connection with a narcotics-related shooting which had occurred in Chicago the previous month. He also suddenly remembered that he had arrested Arango in 1985 on a cocaine-related charge. With this realization, Officer Berti immediately drew his revolver and left the jeep.

However, while Officer Berti was in the jeep, Officer Martin, who had remained nearby with the suspects, likewise remembered that Arango was wanted in connection with the recent shooting. Unfortunately for Officer Martin, he did not wait for Officer Berti to rejoin the group before he asked Arango if the police were still looking for him in connection with that shooting. With this inquiry, Arango immediately shoved Officer Martin who fell to the ground and broke his kneecap. The suspects then fled the scene of the assault as Officer Berti fired a warning shot and gave chase.

Two nearby uniformed police officers apprehended Arango about a block away. At that time, Officer Berti formally arrested Arango for assaulting a police officer and conducted a pat-down search. Immediately thereafter, the officers returned Arango to the scene of the assault where Officer Martin was in need of medical attention.

Once there, Officer Berti conducted a more detailed search of Arango's person, discovering and seizing about $3,800.00 in cash, the previously observed digital beeper, and some car keys. Berti then searched the jeep, finding $16,000.00 behind the passenger's seat, a package of cocaine under a jacket in the back seat, a portable telephone between the jeep's front seats, and several documents bearing Arango's name in the glove compartment.

Thereafter, the agents drove the jeep to the DEA garage in downtown Chicago and conducted a second search of the vehicle. This search revealed a secret compartment underneath the carpet between the front and rear seats which contained four additional packages of cocaine.

Arango made his initial appearance the next day, October 30, 1987, and was formally arraigned on November 30, 1987. On December 28, 1987, Arango filed a motion to suppress which the court denied on July 15, 1988. On August 9, 1988, Arango filed a "Motion to Dismiss with Prejudice" because of an alleged violation of the Speedy Trial Act. The court granted the motion, but without prejudice, rather than with prejudice as Arango had requested. Thereafter, Arango waived his right to reindictment and was convicted. The district court denied Arango's post-trial motion to reconsider the court's earlier decision to dismiss the indictment without prejudice.

II. DISCUSSION

Arango raises two issues on appeal. First, Arango argues that the district court erroneously denied his motion to suppress the evidence discovered during two warrantless searches of the jeep. He also contends that the district court erroneously granted his motion to dismiss for a Speedy Trial Act violation without prejudice, rather than with prejudice as he had requested.

A. *Fourth Amendment Violations*

Officers Berti and Martin conducted several separate searches in this case.[1] The district court found that Officer Berti's search of the jeep immediately following Arango's arrest qualified as a proper warrantless search incident to arrest. The court also found that the subsequent search of the jeep at the DEA garage was justified as a warrantless auto search based upon probable cause supported in part by the evidence seized during the search incident to arrest. We will address the legality of each of these searches separately.

1. *Search Incident to Arrest*

In *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), the Supreme Court held that police officers, subsequent to a lawful arrest, may search the person of an arrestee, and any area into which he might reach in order to grab a weapon or evidentiary items, without a search warrant and as merely an incident to arrest. 395 U.S. at 762-63, 89 S. Ct. at 2039-40; *see also United States v. Karlin*, 852 F.2d 968, 970 (7th Cir. 1988) (discussing the search incident to arrest exception in the context of automobile searches). In *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d

[1] Arango alleges that the officers conducted six separate "searches," including (1) Officer Martin's reaching into Maldonado's jacket pocket, (2) Officer Berti's unlocking of the jeep door to gain access to the wallet on the front seat, (3) Officer Berti's pat-down search of Arango following Arango's apprehension following his assault on Officer Martin, (4) Officer Berti's more thorough search of Arango's person once he returned Arango to the scene of the crime, (5) Officer Berti's search of the jeep's interior at the scene following Arango's arrest, and (6) the officers' search of the jeep after it was removed to the DEA garage. The district court opined that the search of the jeep which yielded Arango's wallet was not based upon probable cause and that no exception to the fourth amendment justified the officers' conduct. However, the district court found that various exceptions to the fourth amendment's warrant requirement applied to justify the other searches.

768 (1981), the Supreme Court extended this exception to searches of automobiles following a lawful arrest. The Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . ." 453 U.S. at 460, 101 S. Ct. at 2864 (footnote omitted), *quoted in Karlin*, 852 F.2d at 970.

Arango argues that the officers could not search the vehicle incident to his arrest because of the special circumstances surrounding the arrest. Arango contends that this exception to the fourth amendment's warrant requirement does not apply when (1) the crime for which an arrest is made, and which forms the basis for the search incident to arrest, does not directly involve the vehicle itself or (2) when the actual arrest does not occur while the arrestee is an occupant of the automobile or at least within immediate "grabbing distance" of the vehicle. He thus concludes that, because he was arrested for the crime of assault upon a police officer and was arrested approximately a block from the scene of the assault and returned there prior to the search, the search of the jeep cannot qualify as a legal search incident to arrest.

Initially, we reject Arango's attempt to distinguish *Belton* based upon the nature of the offense and the manner in which it was committed. *Chimel* and *Belton* are premised upon the need to protect police officers and citizens who may be standing nearby from the actions of an arrestee or his confederate who might gain access to a weapon. These cases also recognize the need to prevent an arrestee or a confederate from destroying evidence located in the area. We believe that the proper focus must be upon the presence of an arrestee, not the offense or the manner in which it was committed. We recently rejected an arrestee's attempt to distinguish *Belton* upon grounds very similar to those advanced by Arango here.

In *Karlin*, a police officer received a radio report of a burglary suspect being chased by citizens. 852 F.2d at 970.

When he arrived on the scene, he found two citizens standing over the defendant who was lying on the ground with his foot inside the open driver's door of a van. *Id.* The citizens indicated that the defendant was the man they had chased and that they had removed him from the van. *Id.* After arresting and handcuffing the defendant, the officer placed him in the rear of the squad car. *Id.* Thereafter, the officer searched the van, finding a gun which formed the basis of a charge for which the defendant eventually was convicted. *Id.*

On appeal, the defendant argued that *Belton* did not apply because at the time the officer searched the vehicle the defendant was secured in the squad car and could not reach any weapon or evidence, the justifications for the exception originally formulated by the Supreme Court in *Chimel*. *Id.* We specifically rejected this argument, refusing to determine the applicability of *Belton* based upon the degree to which the officer secured the defendant prior to conducting the search. We stated:

> If those differences in degree are to control, the Court's preference for a straightforward rule for guidance of police officers and avoidance of hindsight determinations in litigation would be frustrated. It seems quite likely that, in instances where occupants of a car are arrested, they will be outside the car and will have been placed under some measure of security before the car is searched.

Id. at 970-71. We noted that decisions from this and other courts supported our reasoning. *See United States v. Queen*, 847 F.2d 346, 353-54 (7th Cir. 1988), *and cases cited therein.*

We believe that our holding in *Karlin* largely addresses Arango's contentions. Clearly, *Karlin* forecloses Arango's argument that *Belton* does not apply because he was secured in the rear seat of a squad car following his arrest. Further, it recognizes that the presence of an arrestee mandates the need to protect both persons and evidence from the often imprudent and unpredictable actions of a person just arrested, or perhaps even a nearby

confederate. This principle applies whenever an arrestee is within "grabbing distance" of these items without regard as to the nature of the offense committed.

It is the threat of arrest or the arrest itself which may trigger a violent response—regardless of the nature of the offense which first drew attention to the subject. For example, in search incident to arrest cases in which an arrest is made inside a residence, officers clearly have a right to search certain rooms, drawers, closets, and other areas for their protection and the protection of evidence without reference to the offense for which the arrest is made. We therefore hold that *Belton* similarly justifies a search of a vehicle incident to arrest without regard to the nature of the offense supporting the arrest.

Nevertheless, we must address Arango's argument that *Belton* cannot apply because he was arrested approximately one block from where the assault occurred and returned to the scene by the officers which only then created a need to search the nearby vehicle. In *Karlin*, we stated that *Belton* applied, even though the arrestee was handcuffed and secured in the rear seat of a squad car, and that the officer could search any area "into which [the arrestee] might have reached at the time of arrest." 852 F.2d at 972. Using a literal interpretation of this language, one might argue that a search is proper only if the arrestee is apprehended when he is in the immediate vicinity of the vehicle—and under ordinary circumstances, the scope of a search may be so limited. Thus, Arango raises a plausible argument that his capture approximately a block away from the scene of the assault perhaps should preclude an application of the search incident to arrest exception under *Belton*.

However, under the specific facts of this case, we believe that the search of the vehicle as incident to an arrest was entirely reasonable. When Arango was apprehended approximately one block from where he committed the assault, Officer Berti conducted a quick pat-down of Arango's person. Within only a very short time, the officers, with Arango in-tow, returned to the place where

Officer Martin was in need of medical attention for his broken kneecap. Once at the scene, and after checking on Officer Martin's condition, a thorough search of Arango's person and the vehicle was made. Under the circumstances presented here, the immediate return of Officer Berti to the location of his injured partner necessarily put Arango in proximity to the jeep. Thus, consistent with our holding in *Karlin*, the search of the vehicle was incident to the arrest and appropriate to protect all persons as well as evidentiary items.

Contrary to Arango's assertions, we do not believe our decision here will "give arresting officers unlimited discretion to search any vehicle, by merely transporting the arrestee to the vehicle's location." We do not hold that officers may search by artificially creating a situation to fit within an exception to the fourth amendment's warrant requirement. Nothing in the record indicates that the decision to return Arango to the scene of the assault was for the purpose of supporting a warrantless search of the vehicle; the officers had a legitimate reason and a pressing need to return to the scene of the assault immediately. Bringing Arango with them was certainly the sensible thing to do. Further, although not raised by Arango as a basis for rejecting application of *Belton*, we do not believe that the delay between Arango's capture and the initial pat-down and the subsequent search of the vehicle was significant enough to destroy the "nearly contemporaneous" aspect of the exception. *See, e.g., Queen*, 847 F.2d at 352-53.

An arrestee cannot distinguish *Belton* when a situation naturally exists and fits within the recognized exception to the fourth amendment's warrant requirement. The search must be upheld when the officers merely did what they were legally entitled to do under the prevailing circumstances. As we recognized in *Karlin*, both *Chimel* and *Belton* are based upon the need for bright-line rules, rules which will allow police "in most instances [to] reach a correct determination beforehand" and avoid "litigation in every case over the supporting reasons." 852 F.2d at 970 (discussing *Belton*). We also noted that the law:

> does not require the arresting officer to undergo a detailed analysis, at the time of arrest, of whether the arrestee, handcuffed or not, could reach into the car to seize some item within, either as a weapon or to destroy evidence, or for some altogether different reason. The facts surrounding each arrest are unique, and it is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile. The law simply does not require the arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle.

United States v. Cotton, 751 F.2d 1146, 1148 (10th Cir. 1985), *quoted in Karlin*, 852 F.2d at 971.

We believe that our holding today furthers "the Court's preference for a straightforward rule for guidance of police officers and avoidance of hindsight determinations in litigation." *Karlin*, 852 F.2d at 971. We therefore hold that the district court properly denied Arango's motion to suppress the evidence seized during the search conducted immediately following Arango's arrest.[2]

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[2] Even if we assume solely for the sake of analysis that the search incident to arrest exception did not justify the officers' search of the jeep shortly after Arango's arrest, we believe that the search could have qualified as a valid warrantless inventory search. Once Arango was lawfully arrested, the officers had a right to inventory the contents of the impounded vehicle to protect the owner's valuables, to protect the government from claims of lost, stolen, or damaged property, and to protect the officers from dangerous objects therein. *See, e.g., Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

We believe that the officers conducted such a search, if not at the scene of the impoundment, at the DEA garage a short time later. Thus, even if the search of the vehicle conducted at the scene immediately following the arrest were somehow illegal, the

(Footnote continued on following page)

2. *The Postarrest Search and the Automobile Exception*

Having found that the search of the jeep at the time of Arango's arrest was legal, we easily may dispose of Arango's remaining fourth amendment argument. The district court also held that following the search incident to arrest the officers had probable cause to conduct a more thorough warrantless search of the vehicle at the DEA garage pursuant to the "automobile exception." *See Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); *United States v. Boden*, 854 F.2d 983, 994 (7th Cir. 1988). Because we agree that the original search of the jeep incident to Arango's arrest was not illegal or "tainted," we must reject Arango's "fruit of the poisonous tree" argument. We hold that the district court correctly refused to suppress the evidence discovered during the agents' postarrest search of the jeep at the DEA garage.

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[2] *continued*

evidence discovered during that search nevertheless would have been admissible under the "inevitable discovery" doctrine. *See Nix v. Williams*, 467 U.S. 431 (1984).

Arango asserts that the "illegality and intrusiveness" of the two pre-arrest searches "illustrates the bad faith and investigatory motives of the officers" and renders the warrantless inventory search exception *per se* inapplicable. He correctly states that such searches must be conducted pursuant to standardized procedures and not merely as a pretext for establishing probable cause to justify further searches. *Bertine*, 479 U.S. at 372, 107 S. Ct. at 742. However, while the officers' clearly had "investigatory motives" when they initiated contact with Arango and Maldonado, the fact remains that the inventory search was the result of Arango's own imprudent decision to assault a police officer, a decision reached after Officer Martin uttered the fateful question concerning Arango's involvement in a narcotics-related shooting, not Officer Berti's search of Maldonado's jacket or the jeep. We therefore easily could base admission of the evidence upon this exception to the fourth amendment's warrant requirement.

B. *The Speedy Trial Act*

The district court dismissed the original indictment against Arango based upon a seventy-two to ninety-three day (depending upon whose version of the facts one chooses) violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* The parties do not dispute that dismissal was proper under the act. However, Arango argues that the district court erroneously granted his motion to dismiss "without prejudice," rather than "with prejudice" as he had requested.

To determine whether dismissal should be with or without prejudice, the act states that a court "shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. § 3162(a)(1). We may reverse a district court's decision to dismiss with or without prejudice based upon these factors only if the district court abused its discretion. *United States v. Taylor*, 108 S. Ct. 2413, 2419 (1988). However:

> a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress.

Id. at 2419. Nevertheless, the Supreme Court noted that "the district court's judgment of how opposing considerations balance should not lightly be disturbed." *Id.* at 2420.

Arango first contends that the court abused its discretion to grant the motion without prejudice because the court ignored the substantial and prejudicial length of the delay. We do not agree.

The district court correctly noted that possession of large amounts of cocaine is undeniably a serious offense. Further, the delay in this case was at most three months.

We do not believe that such a delay is *per se* "substantial" enough to justify dismissing the charges with prejudice. In addition, Arango has failed to demonstrate actual prejudice from the delay; he has not demonstrated how the delay affected his ability to defend himself or substantially impair any of his "intangible rights." *See Taylor*, 108 S. Ct. at 2421-22. Finally, we believe that the district court properly focused upon the cause of the delay. That is, because the delay resulted from the court's misunderstanding of the status of certain motions, including Arango's motion to suppress, rather than from some fault of the government, dismissing the indictment with prejudice would not serve any purpose of encouraging the government to avoid the neglect or bad faith in the prosecution of its cases. *See Taylor*, 108 S. Ct. at 2420. We therefore hold that the district court properly and correctly considered all of the factors mandated by the Speedy Trial Act.

However, Arango also contends that the district court improperly considered factors outside the scope of those which the act contemplates. Specifically, Arango alleges that the court impermissibly based its decision to dismiss without prejudice, rather than with prejudice, upon proof of guilt elicited from Arango in his testimony during his suppression hearing. He argues that if a court is allowed to base its decision on this evidence then a defendant could not assert his fourth amendment rights without somehow tainting all subsequent proceedings, including those under the Speedy Trial Act. Arango claims that, in effect, the court convicts the defendant without conducting a trial and consequently refuses to grant an otherwise meritorious motion without prejudice rather than with prejudice.

We believe Arango's claim is unfounded. The district judge merely stated that he was "aware of the testimony and the motion to suppress" which he felt he should take into consideration under section 3162(a)(1) in determining that the offense charged "related to a significant amount of cocaine." He clearly was not deciding Arango's guilt or innocence at that stage any more than a district judge

makes a decision of guilt or innocence when ruling upon a defendant's appeal following the denial of a motion for release on bail. Instead, the district judge was properly considering all of the evidence made available to him to determine the seriousness of the offense, an inquiry which he was *required* to make under section 3162(a)(1). We therefore hold that the district judge did not improperly consider the testimony given at the suppression hearing and did not abuse his discretion in denying Arango's motion to dismiss with prejudice.

III. CONCLUSION

We hold that the district court properly refused to suppress the evidence generated by the two warrantless searches conducted after Arango's arrest for assaulting a police officer. Under the facts and circumstances of this case, the first search was a legal search incident to arrest. Further, the evidence discovered and seized during this search provided in part sufficient probable cause to conduct a second more thorough search under the automobile exception to the fourth amendment. We also hold that the district court did not abuse its discretion to dismiss the original indictment "without prejudice," rather than "with prejudice" as Arango requested.

The district court's decision is AFFIRMED.

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(2)

No. 89-649

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANKLYN ARANGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search of a Jeep that petitioner occupied immediately before his arrest was validly conducted incident to that arrest.

2. Whether the district court abused its discretion in remedying a Speedy Trial Act violation by dismissing petitioner's indictment without prejudice.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 879 F.2d 1501.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989. The petition for a writ of certiorari was filed on September 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

of possession of 3438.9 grams of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); conspiracy to possess cocaine, in violation of 21 U.S.C. 846; and assaulting a federal officer, in violation of 18 U.S.C. 111. He was sentenced to concurrent terms of 10 years' imprisonment to be followed by 10 years' supervised release on the narcotics counts, and five years' probation on the assault count.

1. On October 29, 1987, two Drug Task Force officers were investigating narcotics trafficking on the north side of Chicago. While on patrol, the officers received a radio message that a white Jeep Cherokee without license plates had been seen in the area; soon thereafter, the officers saw a Jeep fitting that description and began to follow it. After the officials had followed the Jeep for about nine blocks, the Jeep pulled over and two men got out. Petitioner, the passenger, and Tony Maldonado, the driver, were both wearing digital beepers that were activated, indicating incoming calls. Pet. App. A2; Gov't C.A. Br. 5-6.

The officers approached the two men, identified themselves as police officers, and asked for identification. Maldonado gave the officers a driver's license and the keys to the Jeep, but said he did not know who owned it. Petitioner told the officers that he had no identification. The officers frisked Maldonado and found $2,200 in his jacket pocket. Detective Clifford Berti then looked into the Jeep, saw a wallet on the seat where petitioner had been sitting, and opened the door of the Jeep to retrieve it. While Detective Berti was doing that, Sergeant Thomas Martin recognized petitioner as a suspect in a recent narcotics-related shooting, and asked him whether the police were still looking for him. Petitioner immediately shoved Sergeant Martin to the ground, breaking Martin's kneecap, and fled with Maldonado. Two nearby uniformed police officers gave chase, and petitioner was caught about one block away. Detective Berti arrested petitioner for assaulting a police

officer and conducted a pat-down search. The officers immediately brought petitioner back to Sergeant Martin, who was lying on the street and in need of medical assistance. Pet. App. A2-A3; Gov't C.A. Br. 5-7.

Detective Berti then conducted a more thorough search of petitioner's person and found $3,800 in cash and car keys. Berti also searched the Jeep and found $16,000, a package of cocaine on the back seat, and several documents bearing petitioner's name in the glove compartment. The officers drove the Jeep to the DEA garage in Chicago, where they searched it again. That search turned up four packages of cocaine in a secret compartment underneath the carpeting. Pet. App. A4.

2. Petitioner moved to suppress the evidence found in the Jeep. After holding a hearing on March 8, 9, and 17, 1988, the court denied petitioner's motion on July 15, 1988. The court held that the arrest-scene search of the Jeep was justified as a search incident to petitioner's arrest. The court also held that upon petitioner's arrest, the officers had a right to secure the Jeep and to inventory its contents. Having found cocaine in the Jeep, the court added, the officers had probable cause to search the Jeep thoroughly. Gov't C.A. Br. 2; C.A. App. 78-83.

On August 9, 1988, petitioner filed a motion to dismiss the indictment for a violation of the Speedy Trial Act. Because the 70-day time limit of the Act had been exceeded by 72 days, the district court granted petitioner's motion. The court, however, ruled that the dismissal would be without prejudice. Applying the factors set forth in 18 U.S.C. 3162(a)(1), the court explained that the narcotics charge involved "a significant amount of cocaine and was serious"; the government was not at fault in the delay, which resulted from the district court's misunderstanding of the status of certain motions; and the reprosecution of petitioner was consistent with the purposes of the Speedy Trial Act

and the administration of justice. Petitioner waived reindictment and was convicted by a jury on all counts. Pet. App. A4, A12; C.A. App. 38.

3. The court of appeals affirmed. The court held that under *New York* v. *Belton*, 453 U.S. 454 (1981), the search of the Jeep upon petitioner's arrest was lawfully conducted incident to that arrest. The court rejected petitioner's argument that the officers could not search the passenger compartment of the Jeep because petitioner was arrested nearly one block away. The court explained that "under the specific facts of this case, * * * the search of the vehicle as incident to an arrest was entirely reasonable," because petitioner was apprehended following his flight from the scene of Sergeant Martin's assault and the officers had a "legitimate reason and a pressing need to return petitioner to the scene of the assault immediately," to attend to Martin's injuries. Once petitioner was put "in proximity to the jeep," the court reasoned, the search of the Jeep was appropriate under *Belton* "to protect all persons as well as evidentiary items." Pet. App. A8-A9. Alternatively, the court held, even if the arrest-scene search was improper, the cocaine would have been inevitably discovered during a subsequent inventory search, which was conducted at the DEA garage after the impoundment of the Jeep. *Id.* at A10-A11 n.2.

The court of appeals also affirmed the district court's dismissal of the indictment without prejudice. The court stated that in determining the appropriate remedy for the Speedy Trial Act violation, the district court had properly applied the factors listed in 18 U.S.C. 3162(a)(1) and had not abused its discretion. The court also rejected petitioner's argument that the district court had improperly based its remedy on "proof of guilt" derived from petitioner's testimony at the suppression hearing. The court noted that the district court was required to consider the seriousness

of the offense pursuant to 18 U.S.C. 3162(a)(1), and that it could properly consider petitioner's testimony at the suppression hearing in so doing. In applying Section 3162(a)(1), the court said, the district judge "was not deciding [petitioner's] guilt or innocence." Pet. App. A12-A14.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that the officers' on-the-scene search of the Jeep cannot be justified as a search incident to his arrest under *New York* v. *Belton*, 453 U.S. 454 (1981). Petitioner argues that the search was invalid because he was apprehended about a block from the Jeep, and the search occurred only after he was returned to the Jeep's vicinity. That contention is without merit.

In *Belton*, this Court established a bright-line rule to govern the validity of a search of an automobile, incident to the arrest of one of its occupants. The Court noted that under *Chimel* v. *California*, 395 U.S. 752 (1969), police at the time of an arrest may search the area within an arrestee's immediate control in order to protect the arresting officers from weapons and to prevent the destruction of evidence. *Belton*, 453 U.S. at 457. The Court recognized, however, that the application of that rule had produced great uncertainty where the " 'area of immediate control of the arrestee' * * * arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 460. In order to provide a "straightforward" and "workable" rule in that setting (*id.* at 459-460), the Court announced that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," *id.* at 460 (footnotes omitted), and containers found therein, *id.* at 457-460.

In a wide variety of arrest situations, the courts of appeals have applied *Belton* with a view toward preserving the

clarity of its rule permitting the search of automobile passenger compartments. See *United States* v. *McKinnell*, 888 F.2d 669, 672-673 (10th Cir. 1989) ("The search remains a valid search incident to arrest even if it occurs after the suspect has been arrested, handcuffed, and placed outside of the vehicle."); *United States* v. *Edwards*, 885 F.2d 377, 383-384 (7th Cir. 1989); *United States* v. *Valiant*, 873 F.2d 205, 206-207 (8th Cir.), cert. denied, 110 S. Ct. 117 (1989); *United States* v. *White*, 871 F.2d 41, 44 (6th Cir. 1989) ("[O]ur consistent reading of *Belton* has been that, once a police officer has effected a valid arrest, that officer can search the area that is *or was* within the arrestee's control."); *United States* v. *Lorenzo*, 867 F.2d 561 (9th Cir. 1989) (per curiam); *United States* v. *Jorge*, 865 F.2d 6, 9-10 (1st Cir.), cert. denied, 109 S. Ct. 1762 (1989); *United States* v. *Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985); *United States* v. *McCrady*, 774 F.2d 868, 872 (8th Cir. 1985).[1] Likewise, the court of appeals in this case properly applied the bright-line rule of *Belton* to the unique facts before it.

Petitioner assaulted an officer shortly after getting out of the Jeep. He fled, but was promptly captured one block

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[1] A few cases involving distinguishable facts have found *Belton* inapplicable. In *United States* v. *Vasey*, 834 F.2d 782, 785-788 (9th Cir. 1987), the court found that a search was not contemporaneous under *Belton* when, unlike in this case, 30 or 45 minutes had elapsed between the placement of defendant in rear of police car and the search. Cf. *United States* v. *Lorenzo*, *supra*. In *United States* v. *Fafowora*, 865 F.2d 360 (D.C. Cir. 1989), the arrest took place when the arrestees were walking away from a car that they had parked following a chase by DEA agents, 865 F.2d at 361, and the court held that "the passenger compartment of the [car] was not within the 'immediate surrounding area' into which [the arrestees] might have reached at the time the DEA agents caught up with them," *id.* at 362. Here, in contrast, the court of appeals found that at the time of the search, petitioner's "proximity to the jeep" made its search "appropriate to protect all persons as well as evidentiary items." Pet. App. A9.

away. The officers conducted a pat-down search of petitioner and immediately returned him to the scene of the assault so that they could get medical assistance for the injured officer. Once back at the scene of the assault, the officers conducted a more thorough search of petitioner's person and the interior of the nearby Jeep. Those searches were part of a single unbroken process of arresting petitioner, a process that necessarily included returning petitioner to the site of the assault so that the officers could attend to Sergeant Martin. Because petitioner was under a lawful custodial arrest, and because he had occupied the Jeep immediately before his arrest, the search was proper under *Belton*.

Petitioner errs in contending (Pet. 13-14) that the search was improper because he was returned to the Jeep after having been formally placed under arrest a block away. As both courts below found, the officers acted reasonably in returning petitioner to the scene of the assault, because Sergeant Martin needed assistance. Once the officials had returned to the scene, the rationale of *Belton* was fully applicable. The importance of an immediate search was heightened by petitioner's demonstrated propensity for violence and the fact that he was being held in the vicinity of the car while his companion, Maldonado, was still at large. This was not a case, as the court of appeals expressly noted (Pet. App. A9), where the officers brought an arrestee to a vehicle as a pretext for searching it.[2]

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[2] Citing *Chambers* v. *Maroney*, 399 U.S. 42 (1970), petitioner argues (Pet. 13) that because his arrest and the search of the Jeep were not simultaneous, the search cannot be sustained as incident to his arrest. The court of appeals, however, specifically rejected the argument that "the delay between [petitioner's] capture and the initial pat-down and the subsequent search of the vehicle was significant enough to destroy [its] 'nearly contemporaneous' aspect." Pet. App. A9. Only a few minutes elapsed between petitioner's apprehension and the search.

Even if the search of the Jeep was unjustified as a search incident to petitioner's arrest, the evidence found in the Jeep was still admissible. In an alternative holding, the court of appeals ruled that the officers would have inevitably discovered the cocaine in the Jeep's passenger compartment during a routine inventory search at the DEA garage. Pet. App. A10-A11 n.2. That holding was correct.

Following petitioner's arrest, the officers had a clear need to impound the Jeep. Neither petitioner nor Maldonado was in a position to take custody of the tagless vehicle: petitioner was under arrest for assaulting Sergeant Martin and Maldonado had absconded. Having impounded the Jeep, the officers were entitled to inventory its contents. *Colorado* v. *Bertine*, 479 U.S. 367 (1987); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). In the process, they obviously would have discovered the package of cocaine that was lying on the back seat beneath petitioner's jacket.[3] Thus, under *Nix* v. *Williams*, 467 U.S. 431 (1984), the evidence found in the Jeep was admissible regardless of the validity of the arrest-scene search. Accord *United States* v. *Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986).

2. Petitioner next argues (Pet. 21-23) that the indictment should have been dismissed with prejudice because of a violation of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* In determining whether to dismiss an indictment with or without prejudice, the court must consider the seriousness of the offense, the facts and circumstances of the case leading to the dismissal, and the impact of a reprosecution on the administration of the Speedy Trial Act and on the

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[3] That discovery, in turn, would have permitted the full-scale search of the Jeep that resulted in the discovery of additional cocaine in the concealed compartment beneath the carpeting. See *United States* v. *Ross*, 456 U.S. 798 (1982) (permitting warrantless search of all areas of a car that may contain items that the police have probable cause to believe are there).

administration of justice. See *United States* v. *Taylor*, 108 S. Ct. 2413, 2419 (1988); 18 U.S.C. 3162(a)(1). The application of those factors is committed to the district court's discretion. *Ibid.* The district court did not abuse its discretion in this case when it dismissed petitioner's indictment without prejudice, permitting the government to reinstate the charges and ultimately convict petitioner.

Petitioner's offense—possession of 3438.9 grams of cocaine with intent to distribute it—was unquestionably a serious one, weighing heavily in favor of dismissal without prejudice. In addition, the circumstances of the dismissal supported reprosecution. The cause of the speedy trial violation was the district court's misunderstanding of the extent to which pretrial motion delay is excluded under the Act. See *Henderson* v. *United States*, 476 U.S. 321, 326-330 (1986) (excludable delay attributable to a pretrial motion usually ends 30 days after the hearing is completed). Petitioner did not ask the court to rule more promptly on his pending motion, and there was no bad faith or intentional delay on the part of the government. Finally, petitioner was not prejudiced by the delay. Pet. App. A12-A13. Those factors fully justified the district court's decision.

Petitioner also argues (Pet. 19-21) that the district court should not have considered his suppression-hearing testimony in applying Section 3162(a)(1), because such consideration forces a defendant into a "Hobson's choice"; according to petitioner, a defendant in such a position may forgo his right to a speedy trial if he chooses to assert his Fourth Amendment rights. Pet. 21. There is no merit to that claim. The Court has held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be used against him at trial *on the issue of guilt* unless he makes no objection." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968) (emphasis added). That rule has

never been extended to a case in which the government's subsequent use of suppression-hearing testimony does not involve establishing guilt. Compare *United States* v. *Salvucci*, 448 U.S. 83, 93-94 (1980) ("This Court has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial."). Petitioner's guilt or innocence was not at issue in determining whether the offense with which he was charged was "serious" for purposes of the Speedy Trial Act; hence, the conflict of constitutional interests identified by *Simmons* is not present here. Cf. *United States* v. *Baker*, 850 F.2d 1365, 1370 (9th Cir. 1988) (*Simmons* does not bar government from obtaining a superseding indictment based on defendant's testimony at trial which ends in a mistrial); *United States* v. *Hernandez*, 779 F.2d 227 (5th Cir. 1985) (*Simmons* does not bar the use of suppression-hearing testimony at sentencing), cert. denied, 476 U.S. 1119 (1986).[4]

Nor does the rationale of *Simmons* aid petitioner. Petitioner was in no sense placed in the type of dilemma

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[4] The courts of appeals have also declined to apply *Simmons* to the use of pretrial testimony at the trial itself, where, as in this case, there is no showing that "one constitutional right [must] be surrendered in order to assert another." 390 U.S. at 394. See *United States* v. *Boruff*, 870 F.2d 316 (5th Cir. 1989) (*Simmons* inapplicable to bar government's use at trial of testimony of witness called by defendant in suppression hearing), cert. denied, 110 S. Ct. 160 (1989); *United States* v. *Clawson*, 831 F.2d 909, 912 (9th Cir. 1987) (*Simmons* does not bar use at trial of defendant's affidavit for return of property voluntarily filed in state court), cert. denied, 109 S. Ct. 303 (1988); *United States* v. *Dohm*, 618 F.2d 1169, 1174 (5th Cir. 1980) (en banc) (*Simmons* does not bar the use at trial of the defendant's testimony in bail hearings). Compare *United States* v. *Kahan*, 415 U.S. 239, 243 (1974) (per curiam) (defendant who perjured himself at a pretrial hearing to obtain appointed counsel could not invoke *Simmons* to bar the use of that testimony at trial, because the defendant did not surrender "what was 'believed' * * * to be a 'valid' constitutional claim").

Simmons sought to avoid. In *Simmons*, the Court observed that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof * * * necessary to assert a Fourth Amendment claim." 390 U.S. at 392-393. When petitioner testified at his suppression hearing, however, he could not possibly have "known" that there might be a future Speedy Trial Act violation. That violation occurred only when the district court failed to decide his suppression motion within 30 days of the hearing. Consequently, unlike the defendant in *Simmons*, petitioner was not forced to choose between testifying at his suppression hearing and giving up some known right.[5]

At all events, the district court's consideration of petitioner's testimony would not have made a difference in the court's ruling on the remedy issue. The seriousness of petitioner's offense was manifest from the charges in the indictment and from the seizure of the cocaine itself. Petitioner's admission at the suppression hearing that he possessed a large quantity of cocaine was merely cumulative of other information before the court. Consequently, even if petitioner's admission had not been considered, the outcome of his speedy trial motion would have been the same. Any error in the district court's consideration of petitioner's testimony was therefore harmless.

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[5] Nor would any future defendant have reason to be deterred from testifying in a pretrial hearing because of a speculative, future Speedy Trial Act violation. The possibility of such an event coming to pass is simply too remote.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1990

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